CASE NO. 84-6873

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

* *

ROBERT PATTEN,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

* *

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

* *

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QUESTIONS PRESENTED

I

WHETHER A DEFENDANT WHO INTRODUCES NO EVIDENCE BY ANY MEANS (AFFIRMATIVELY OR BY CROSS-EXAMINATION) THAT RAISES THE AFFIRMATIVE DEFENSE OF INSANITY AT THE TIME OF THE OFFENSE IS DENIED DUE PROCESS WHERE THE STATE DID NOT "REBUT" THE AFFIRMATIVE DEFENSE AND WHETHER THE SUPREME COURT OF FLORIDA'S DECISION TO THE CONTRARY CONSTITUTES JUDICIAL EX POST FACTO APPLICATION OF THE LAW?

II

WHETHER THE SUPREME COURT OF FLORIDA'S DECISION REMANDING THE CASE TO THE TRIAL COURT FOR RESENTENCING, WHERE THE ERROR RESULTING IN REVERSAL OF THE INITIAL SENTENCE WAS THE GIVING OF AN IMPROPER INSTRUCTION ON SENTENCING TO THE ADVISORY JURY, VIOLATES THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

I
OPINIONS BELOW

The opinion of the Supreme Court of Florida affirming, on direct appeal, Petitioner's convictions for first-degree murder, armed robbery and grand theft, vacating Petitioner's death sentence and remanding the case for a new sentencing proceeding is currently reported in Patten v. State, 467 So.2d 975 (Fla. 1985).

II
JURISDICTION

Petitioner is seeking to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1287(3), based upon his contentions that the State of Florida has deprived him of rights secured by the Constitution of the United States. Respondent submits that this Court may review these claims pursuant to 28 U.S.C.§1256(3), but is urged to decline to do so, as the opinion of the Supreme Court of Florida does not deprive Petitioner of any rights set forth in the United States Constitution.

III
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner has contended that this case involves the Double Jeopardy Clause of the Fifth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States. The pertinent portions of the Fifth Amendment read as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, not be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities or citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

IV

STATEMENT OF THE CASE

The petitioner, Robert Patten, was convicted of first-degree murder, and robbery and grand theft, and was found to have violated his probation for the offense of auto theft.

He was sentenced to death for the murder conviction and to 110 years' imprisonment for the robbery conviction, five years for grand theft, and five years for auto theft, all sentences to be served consecutively. On direct appeal, the Supreme Court of Florida affirmed the convictions. Pursuant to Petitioner's claims, the Court vacated the death sentence and remanded the case to the trial court for a new sentencing proceeding before a jury and directed the trial court's attention to this Court's decision in Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) and its possible application to the facts of this case. Patten v. State, 467 So.2d 975, 980. (See Petitioner's Appendix to Petition for Writ of Certiorari to the Supreme Court of Florida, Exhibit A).

The facts of the offenses in question were that on September, 1981, the victim, a Miami police officer, attempted to stop Petitioner for travelling the wrong way on a one-way street. Petitioner abandoned his car, which was later determined to have been stolen and fled the scene on foot. He ran down an alley with the officer (Nathaniel Broom) in pursuit. Witnesses heard gunshots and one witness testified that Petitioner had hidden in the alley and waited for the officer to approach before shooting him. The officer was found dead with two bullet wounds. One bullet had penetrated his heart, killing him instantly, and another had entered the officer's foot in a manner indicating that the officer had been shot after he was dead and lying prostrate. Patten v. State, supra at 467 So.2d 976.

Immediately after the shooting, stole a care at gun-point and fled the area. He was arrested later that day and charged with first-degree murder, armed robbery, grand theft and violation of probation. Two days later, after obtaining a search warrant, the police recovered the murder weapon from beneath a heating grate in Petitioner's grandmother's home.

Prior to trial, the court and the prosecutor were apprised of the facts that Petitioner had been adjudicated not quilty of receiving stolen property by reason of insanity in 1978 and had been involuntarily committed to the Department of Health and Rehabilitative Services for treatment under the provisions of Section 394.467, Florida Statutes (1977). On September 25, 1981, the trial court, on its own motion prior to Petitioner's arraignment, ordered an evaluation of the Petitioner "covering all issues including insanity and competency and incompetency to stand trial." Prior to receiving the reports of the fourth experts appointed to examine petitioner, and prior to the hearing on Petitioner's competency to stand trial, counsel for the petitioner withdrew a pending motion for release on bail and orally advised the trial court that the defense would be filing a notice of intent to rely on the insanity defense and would request a hearing to determine if Petitioner was mentally competent to stand trial. Counsel for petitioner subsequently filed a notice of intent to rely on the insanity defense and a motion requesting a competency hearing, Id.

The court-ordered competency hearing was held on October 9, 1981. Three of the appointed doctors testified before the court and the fourth doctor's written report was submitted to the court by stipulation. During the course of these proceedings, the 1978 trial court order finding Petitioner not guilty by reason of insanity and the others conditionally relasing him were admitted into evidence. The trial court found, in accordance with the unanimous opinion of the experts, that Petitioner was competent to stand trial pursuant to the criteria set forth in Florida Rule of Criminal Procedure 3.211. The trial court proceeded to arraign the Petitioner and, when he stood mute, entered a plea of not guilty on his behalf.

In a pre-trial motion, counsel for the Petitioner moved for a ruling on the insanity test to be applied at trial. Petitioner asserted that the trial court should discard the M'Naghten rule and adopt the A.L.I. Model Penal Code test. While acknowledging that the Petitioner had been examined by a number of psychiatrists, all of whom indicated that the accused was legally sane under the M'Naghten rule, defense counsel argued that the M'Naghten rule constituted both a denial of substantive and procedural due process and cruel and unusal punishment. The trial court denied the motion, finding that it had no authority to change the criteria for the test for insanity that had been specifically adopted by the Supreme Court of Florida.

In the trial phase of the proceedings, the defense did not contest that Petitioner had killed the police officer; the theory of the defense was that petitioner, in firing the shots, had acted "in a moment of panic" and that this tragic offense was not premeditated murder. Further, no evidence was submitted regarding Petitioner's prior adjudication of not guilty by reason of insanity.

During sentencing deliberations, the jury advised the trial judge that they were deadlocked six-to-six with regard to a recommended sentence. The judge instructed the jury:

> If you can agree on a majority to either life or death, without trying to pressure you, by talking it over one more time and agreeing one way or another, and I'm not suggesting any result, but if after trying one more time you can't agree and it's still six/six, I will instruct you to go ahead and sign that verdict form that includes life imprisonment without parole for 25 years.

The jury, after continued deliberations, returned with a seven-to-five recommendation for death. The trial judge subsequently imposed that death sentence as to the murder conviction.

Following the filing of the revised opinion in the instant case in Patten v. State, supra, on April 18, 1985, Petitioner filed a Petition for Writ of Certiorari to the Supreme Court of Florida. This brief is filed in opposition to the granting of the writ.

V

REASONS IN OPPOSITION TO GRANTING CERTIORARI

PROPOSITION I

A DEFENDANT WHO INTROCUCES NO EVIDENCE BY ANY MEANS (AFFIRMATIVELY OR BY CROSS-EXAMINATION) THAT RAISES THE AFFIRMATIVE DEFENSE OF INSANITY AT THE TIME OF THE OFFENSE IS NOT DENIED DUE PROCESS WHERE THE STATE DID NOT "REBUT" THE AFFIRMATIVE DEFENSE OF INSANITY AT THE TIME OF THE OFFENSE AND THE FLORIDA SUPREME COURT'S DECISION TO THIS EFFECT DID NOT CONSTITUTE JUDICIAL EX POST FACTO APPLICATION OF THE LAW.

Petitioner contends that the decision of the Supreme Court of Florida in the instant case constitutes ex post facto application of Florida law and that as such, it violates Constitutional due process protections. It is Respondent's position that there is no violation of due process where a defendant, such as was the case herein, introduces no evidence by any means, either affirmatively or by cross-examination, that raises the affirmative defense of insanity at the time of the offense, thus not shifting the burden to the State to "rebut" the affirmative defense, where the State introduces no evidence to that effect. Moreover, the decision of the Florida Supreme Court is consistent with its prior opinions and at minimum, only clarifies existing case law that has confused "terms of art" as to the complex field of litigation concerning competency and insanity clains. Thus, there will be no judicially imposed ex post facto application of the law in question in the instant case, pursuant to the Florida Supreme Court's opinion in this case.

Contrary to Petitioner's implications, Florida has never held that insanity is not an affirmative defense nor that it is raised without the defendant bearing the burden of production (contrary to the burden of persuasion) to raise the affirmative defense of insanity. In this case, as noted above, no evidence whatsoever of insanity was presented to the trier of fact to actually raise the defense of insanity. Florida courts have long held that the burden of proving insanity is on the defendant because he is presumed sane under the law, and that once a defendant rebuts the presumption of sanity by presenting evidence of insanity sufficient to raise a reasonable doubt, the burden shifts to the State to prove sanity beyond a reasonable doubt. Johnson v. State, 408 So.2d 813, 815 n.2 (Fla. 3d DCA 1982); Holmes v. State, 374 So.2d 944 (Fla. 1979), cert. denied, 446 U.S. 913, 100 S.Ct. 1845, 64 L.Ed.2d 267 (1980). See also; Brock v. State, 69 So.2d 344 (Fla. 1954). In fact, the jury instruction as to insanity, as approved by the Supreme Court of Florida, clearly specifies that if the evidence establishes that the defendant has been adjudged insane by a Court, and restoration of legal sanity has not occurred, the jury should assume that the defendant was legally insane at the time of the commission of the alleged crime, unless the evidence convinces the jury otherwise. 3.04(b), Florida Standard Jury Instructions in Criminal Cases.

Petitioner has paraphrased language from decisions that constitute old caselaw where the conceptual difference between a defendant's competency to stand trial and the

elements of and procedure for raising an insanity defense. For example, it is a due process right for one not to be tried when incompetent. This right exists regardless of the elements necessary to prove the changed offense. Florida has never changed the elements necessary for an insanity defense. Florida had never retracted or altered the test followed, a modified M'Naghten test. See, e.g., Ferguson v. State, 367 So.2d 631 (Fla. 1982); Zamora v. State, 361 So.2d 776 (Fla. 3d DCA 1978). Moreover, Florida courts have consistently held that a defendant's sanity at the time of the offense, is a factual question for the jury. Ferguson, supra at 435. See also; Eason v. State, 421 So.2d 35, 37 (Fla. 3d DCA 1982). Florida law has therefore held that the issue of sanity is a fact question as to a defendant's affirmative defense. It therefore follows that Petitioner was on notice by virtue of Florida law that to go forward with an affirmative defense, evidence had to be presented to trier of fact, notwithstanding the fact that he could easily raise the presumption provided for by his prior status, as a prior adjudication of insanity is considered evidence of insanity. See, e.g., Boone v. State, 183 So.2d 869, 871 (Fla. 1st DCA 1966); Hixon v. State, 165 So.2d 436, 439 (Fla. 2d DCA 1964).

Furthermore, the instant case does not involve a situation where the State has changed the elements of a crime or a defense. This situation merely involves a matter of procedure. No case cited by Petitioner demonstrates that the test for sanity, a modified M'Naghten rule test, was altered between the time prior to the commission of the crime in question and the time of the Florida Supreme Court's ruling as to Petitioner's appeal.

The Florida Supreme Court's decision in this case has merely clarified the difference between the burden of persuasion and the burden of production. The burden of production is not a substantive element of a charged offense. Moreover, procedural questions are not presented until the affirmative defense is raised. It is clear that the true defense in this case was not insanity, but, rather that in firing the shots at the victim, the petitioner had acted "in a moment of panic" and not by premeditation. Patten v. State, supra at 467 So.2d 976. The instant decision simply makes existing law clear, namely that once evidence of insanity is introduced, including by evidence of a prior finding of insanity, the burden is shifted on the State to go forward and prove sanity beyond a reasonable doubt. Since Petitioner neither actually relied on an insanity defense, nor presented any evidence at all in order to invoke an evidentiary presumption, he should not be heard to complain of alleged due process right violations by the State of Florida.

Contrary to Petitioner's assertions, the Florida Supreme Court's opinion is clearly not an ex post facto application of a "change in the law", but rather a modern clarification consistent with this Court's prior opinions. The State court has appropriately pointed out insanity is an affirmative defense. See, Leland v. Oregon, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed.130 (1952). Patterson v. New York, 432 U.S. 197, 97 S.Ct.2319, 53 L.Ed.2d 281 (1977), makes it clear that so long as a jury is instructed that the State has the burden of proving every element of the crime beyond

a reasonable doubt, there is no due process violation. Krzeminski v. Perini, 614 F.2d 121, 123 (6th Cir. 1980). The presumption in question is clearly an evidentiary device and the law provides for the trier of fact to be presented with evidence. The Court's opinion is not a departure from the above-noted principle and is not a "change in the law", as it is consistent with its prior pronouncements and those of this Court. Petitioner's Petition for Writ of Certiorari should therefore be denied.

PROPOSITION II

THE SUPREME COURT OF FLORIDA'S DECISION REMANDING THE CASE TO THE TRIAL COURT FOR RESENTENCING, WHERE THE ERROR RESULTING IN REVERSAL OF THE INITIAL SENTENCE WAS THE GIVING OF AN IMPROPER INSTRUCTION ON SENTENCING TO THE ADVISORY JURY, DOES NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The decision of the Supreme Court of Florida remanding the instant case to the trial court for resentencing following a new recommendation by an advisory jury does not violate the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. In the instant case, the advisory sentencing jury sent a note to the trial court requesting guidance because they were deadlocked 6 to 6 as to whether the recommended sentence should be life imprisonment with a minumum mandatory term of twenty-five (25) years' imprisonment or death. The jury's request prior to the court's subsequent instruction to reconsider the sentence did not rise to the level of a final advisory recommendation of the sentence to be imposed. See, Rose v. State, 461 So.2d 84, 86 (Fla. 1984); See also: Rose v. State, 425 So.2d 521 (Fla. 1982), cert denied, 461 U.S. 909 (1983). Thus, there was no "acquittal" as to the death sentence by the original advisory jury.

Furthermore, as this Court has noted in Spaziano v. Florida, ___U.S.___, 104 S.Ct. 3154, 3165, __L.Ed.2d___(1984), that if a judge may be vested with the sole responsibility with imposing the penalty, then there is nothing constitutionally wrong with the judge's exercising that responsibility

after receiving the advice of the jury. The advice does not become a judgment simply because it comes from the jury, Id. See also: Baldwin v. Alabama, ___U.S.___(1985) (Case No. 84-5743; Opinion filed June 17, 1985)[53 USLW 4759].

The original sentence imposed in this case was set aside as a result of Petitioner's challenge to the instructions given to the advisory sentencing jury. The petitioner chose to appeal the initial sentence and the Double Jeopardy Clause does not relieve a defendant from the consequences of his voluntary choice. United States v. Scott, 437 U.S. 82, 98, 98 S.Ct. 2187, 2198, 57 L.Ed.2d 65 (1978). In addition, the double jeopardy considerations that bar reprosecution after an acquittal do not prohibit review of a sentence (and resentencing). See, United States v. Di Francesco, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980).

Moreover, this Court has constantly adhered to the rule that a retrial following a "hung jury" does not violate the Double Jeopardy Clause. Richardson v. United States ___U.S.___, 104 S.Ct. 3081, 3085,___L.Ed.2d____(1984), citing to Logan v. United States, 144 U.S. 263, 297-298, 12 S.Ct. 617, 627-628, 36 L.Ed. 429 (1892). Thus, it follows that it does no harm to the Double Jeopardy Clause to allow for the impaneling of a new advisory sentencing jury were the jury was initially "hung" or "deadlocked." The situation presented herein is analogous to the situation where a defendant is retried in a jury trial following a reversal on appeal resulting from erroneous jury instructions. In those cases, there is no double jeopardy violation. See,

Forman v. United States, 361 U.S. 416, 80 S.Ct. 481, 4 L.Ed.2d 412 (1960). If there is no double jeopardy violation upon the granting of an entirely new trial when the challenge is as to a conviction, it certainly does no harm to grant an entirely new procedure as to sentencing. See, e.g., North Carolina v. Pearce, 395 U.S. 711, 720, 89 S.Ct. 2072, 2078, 231 L.Ed.2d 656 (1960); United States v. Tateo, 377 U.S. 463, 465, 84 S.Ct. 1587, 1589, 12 L.Ed.2d 448 (1964).

Since the decision of the Supreme Court of Florida, in the instant case clearly does not call for a result violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution there is no reason for granting a writ of ceriorari. Petitioner's petition for a writ of certiorari should therefore be denied.

CONCLUSION

Based upon the foregoing reasons and authorities, Respondent respectfully submits that Petitioner's Petition for Writ of Certiorari to the Supreme Court of Florida should clearly be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, CALIANNE P. LANTZ, counsel and a member of the Bar of the United States, hereby certify that on the 9th day of July, 1985, I served a single copy of the Brief in Opposition to Petition for Writ of Certiorari filed pursuant to Supreme Court Rules 22.2 and 28 on PETER M. SIEGEL, Esq., and RANDALL C. BERG, Jr., Esq., Florida Justice Institute, Inc., 1400 Ameri First Building, 1 S.E. Third Avenue, Miami, Florida 33131 on this 9th day of July 1985.

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